**Industrial Materials Clearance, Inc. *and* David Powers *and* Local 247, International Brotherhood of Teamsters, AFL–CIO.** Cases 7–CA–46312 and 7–RC–22490

April 30, 2004

## DECISION, ORDER, AND DIRECTION

BY MEMBERS SCHAUMBER, WALSH, AND MEISBURG

On November 5, 2003, Administrative Law Judge David L. Evans issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

[1] There are no exceptions to the judge's findings that the Respondent violated Sec. 8(a)(1) by coercively asking employee Horton to tell the Union to withdraw its election petition, by coercively interrogating Horton, and by questioning employees Horton and Messer in preparation for the unfair labor practice hearing without complying with the safeguards established in *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965).

[2] In adopting the judge's finding that employee David Powers was discharged on May 28, 2003 in violation of Sec. 8(a)(3) and (1), we find, as the judge ultimately did, that the confluence of all the circumstances supports an inference that the Respondent knew of Powers' union activities when it discharged him, and that those activities were a motivating factor in his discharge. We therefore find it unnecessary to pass on the judge's suggestion that unlawful motivation for Powers' discharge could be inferred from the timing of the discharge alone. We also find it unnecessary to rely on the statement of the Respondent's owner, Mitch Foster, in 2002, that he would do "what it took" to get the Teamsters out at the end of their contract, as a basis for finding that Powers' discharge was unlawfully motivated.

In adopting the judge's finding that the Respondent did not show that it would have discharged Powers in the absence of his union activities, we also rely on Powers' testimony that the Respondent's comptroller told him in May 2003 that the Respondent was in good economic condition. Although not mentioned by the judge in his decision, this testimony was uncontradicted, and we find that it further belies the Respondent's contention that Powers would have been discharged in any event for economic reasons. In reaching this conclusion, we find it unnecessary to rely on the adverse inferences which the judge drew against the Respondent because it did not present documents or additional witnesses to further support its asserted economic justification.

Member Walsh joins his colleagues in relying on this additional testimony of Powers. In all other respects, Member Walsh would adopt the rationale of the judge in its entirety.

## ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Industrial Materials Clearance, Inc., Romulus, Michigan, its officers, agents, successors, and assigns, shall take the actions set forth in the Order.

## DIRECTION

IT IS DIRECTED that the Regional Director for Region 7 shall, within 14 days from the date of this Decision, Order, and Direction, open and count the ballot of David Powers. The Regional Director shall then prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C., April 30, 2004

Peter C. Schaumber, Member

Dennis P. Walsh, Member

Ronald Meisburg, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Erickson C.N. Karmol, Esq.*, for the General Counsel.
*Thomas F. Campbell, Esq.*, of Northville, Michigan, for the Respondent.

## DECISION

### STATEMENT OF THE CASE

DAVID L. EVANS, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in Detroit, Michigan, on August 20–21, 2003.[1] On June 3, in Case 7–RC–22490 (the representation case), Teamsters Local Union No. 247, AFL–CIO (Petitioner or the Union), filed a petition with the National Labor Relations Board (the Board) seeking certification as the collective-bargaining representative of all mechanics of Industrial Materials Clearance, Inc. (Employer or the Respondent). On June 9, in Case 7–CA–46312 (the unfair labor practice case), David Powers, an individual, filed a charge alleging that the Respondent had committed various unfair labor practices under Section 8(a)(1) and (3) of the Act.[2] On July 14, pursuant to a Stipulated Election Agreement,

[1] Unless otherwise indicated, all dates mentioned are in 2003.

[2] Sec. 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

agents of the Regional Director conducted an election among the Employer's mechanics; the results of that election were that one vote had been cast for representation by the Petitioner, one vote had been cast against such representation, and there was one challenged ballot. The challenge therefore affected the results of the election. On July 30, the Regional Director issued a document consisting of four parts: (a) a complaint alleging, inter alia, that, in violation of Section 8(a)(1), the Respondent had solicited an employee to get the Union to withdraw the petition in the representation case and that, in violation of Section 8(a)(3), the Respondent had discharged Powers; (b) a report on the determinative challenged ballot, which ballot had been cast by Powers; (c) an order consolidating the representation and unfair labor practice cases; and (d) a notice of a consolidated hearing in both cases before an administrative law judge. The Respondent duly filed an answer to the complaint admitting that this matter is properly before the Board but denying the commission of any unfair labor practices.

Upon the testimony and exhibits entered at trial,[3] and after consideration of the briefs that have been filed, I enter the following

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### I. JURISDICTION AND LABOR ORGANIZATION'S STATUS

As it admits, at all material times the Respondent, a corporation with an office and place of business in Romulus, Michigan, has been engaged in the business of providing waste disposal services to other businesses in the Detroit area. During 2002, in conducting that business operation, the Respondent derived gross revenues in excess of $500,000, and it provided services valued in excess of $50,000 to businesses within Michigan, each of which during the same period purchased and directly received goods valued in excess of $50,000 from suppliers located at points outside Michigan. Therefore, at all material times the Respondent has been an employer that is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. As the Respondent further admits, at all material times the Union has been a labor organization within the meaning of Section 2(5) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *A. Facts*

The Respondent operates a fleet of trucks; the Respondent's truckdrivers haul industrial waste from businesses in the Detroit area. For maintenance of the trucks, the Respondent also operates a garage which, until the events of this case, employed three mechanics; to wit, Powers, Ronald Messer, and George Horton. For a number of years, the Union has represented the Respondent's truckdrivers (which have numbered from 12 to 14); no union has ever represented the Respondent's mechanics. Mitch B. Foster is the Respondent's owner and president; Nick A. Madias is the Respondent's general manager, and Madias is the immediate supervisor of the mechanics.

1. The General Counsel's evidence—the 8(a)(3) allegation

Powers was first employed by the Respondent in 1990; he then worked until 1997, at which time he voluntarily quit. Powers was rehired by the Respondent on May 26, 2001, and he then worked until he was terminated by Madias on May 28. During his first tenure of employment, Powers worked as a mechanic, a truckdriver, and a dispatcher; when he quit in 1997, he was a mechanic. When Powers returned in 2001, he took the position of dispatcher again; after about a year, former General Manager Jim Mullins made Powers the lead mechanic, a position at which he remained until his final termination. It is undisputed that, of the three mechanics that the Respondent employed at the time of Powers's termination, Powers was by far the superior in terms of mechanical knowledge and skill. Powers is versed in all phases of the trade that are required by the Respondent, and he was the only mechanic who was licensed to do annual inspections that are required for the Respondent's trucks by the Department of Transportation. As lead mechanic, Powers spent 90 to 95 percent of his time working on trucks. The remainder of his working time was consumed by handling the paperwork of the mechanics and answering the questions of the other three mechanics. At the time of his termination, Powers was paid $16 per hour; Messer and Horton were paid $15 and $14.75 per hour, respectively. Madias, who was hired by the Respondent to succeed Mullins on December 17, 2002, has no mechanical background.

Early in 2003, Powers applied for a loan with a Detroit-area lending institution. The lender required a "Verification of Employment" form to be completed by Powers's employer. Madias completed the form for Powers on March 7. In a space for "Present Position," Madias wrote: "Shop Foreman." In a space for "Probability of Continued Employment," Madias wrote: "Very High/Excellent."

The Respondent's business is somewhat seasonal; the mechanics usually have less work during the colder periods of the year and much more during the warmer periods. (The mechanics' personal budgets therefore depend on their greater warm-weather earnings to compensate for their lesser earnings during cold weather.) Powers testified that during the months of May of prior years, the mechanics worked up to 80 hours per week. In early May 2003, however, the Respondent was holding the mechanics to 50 hours per week (10 hours per day, 5 days per week), even though there was more work than could be done in 150 man-hours per week. Horton requested a meeting with Madias to discuss the matter. Madias met with Powers, Messer,

---

ing or other mutual aid or protection." Sec. 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Sec. 8(a)(3) provides that it is an unfair labor practice for an employer "by discriminationto encourage or discourage membership in any labor organization."

[3] Certain passages of the transcript have been electronically reproduced; some corrections to punctuation have been entered. Where I quote a witness who restarts an answer, and that restarting is meaningless, I sometimes eliminate, without ellipses, words that have become extraneous; e.g., "Doe said, I mean, he asked . . . " becomes "Doe asked . . . ." Bracketed words have been inserted by me.

and Horton on or about May 9.[4] When the mechanics asked why they were not receiving more work hours per week, Madias replied that Foster had ordered that their hours be held to 50 per week. When the mechanics asked about the "farming out" of some work that the Respondent was then doing, Madias replied that the subcontracting was only a temporary practice and that it would stop soon. Madias, according to Powers, added that "[h]e was not planning on letting nobody go or doing no layoffs." After the meeting, Powers and Horton agreed that the Union should be contacted.

Powers worked his usual 50 hours during the week of May 19 through 23. On May 21, Powers telephoned Paul Kozicki, a vice president and business representative of the Union. Powers told Kozicki about the mechanics' discontent with their work schedules. Kozicki suggested a meeting between himself and the mechanics.

Powers worked 10 hours on Monday and Tuesday, May 26 and 27. During the evening of May 27, Kozicki met at a local restaurant with Powers and Horton, both of whom then signed authorization cards that designated the Union as their collective-bargaining representative. Powers testified that, after the meeting with Kozicki, he returned to the garage where Messer was still at work. Powers then solicited Messer also to sign a union authorization card, but Messer declined.

Business Agent Kozicki has negotiated and serviced contracts for the Respondent's truckdrivers since 1994. When called by the General Counsel, Kozicki testified that 1 week prior to his meeting with Powers and Horton on May 27, he and Madias scheduled a luncheon meeting for May 28. At that meeting, Madias brought up the subjects of the Respondent's attempts to retrieve a customer that had been lost (at some unspecified point in the past) to a nonunion competitor. Then Madias brought up the topic of the Respondent's then-current need for a truckdriver who would work a 12-hour shift, from 6 p.m. to 6 a.m. After those subjects were completed, Kozicki told Madias that "a majority" of the Respondent's 3 mechanics had signed authorization cards for the Union and asked Madias if the Respondent would voluntarily recognize the Union as those employees' collective-bargaining representative. Madias replied that Foster made all such decisions. Kozicki responded that the Union would send a letter to Foster demanding recognition for the mechanics and that he would file a petition for election with the Board. Madias, further according to Kozicki, asked Kozicki to delay the filing of a petition because "he wanted to eliminate a position." Kozicki replied that he could not delay the filing because "I have two guys that want to join." Kozicki further testified that his May 28 meeting with Madias ended about 12:35 p.m.

About 3 p.m. on May 28, as Powers ended his shift for the day, Madias called him to the Respondent's office area. According to Powers's undisputed testimony: "Nick Madias said that he has to eliminate a position in the shop, and the position was mine, that there is no easy way of doing this." Powers asked for a letter stating that he had been discharged; Madias told him that he could receive one the next day. On May 29, Powers returned to the office; he did not meet with Madias, but a clerical employee gave him a letter addressed "To whom it may concern." In the letter, Madias states that Powers: "Is no longer employed at Industrial Materials Clearance, Inc. His position has been eliminated." The Respondent's weekly pay periods begin on Monday, and Powers had worked only 30 hours by the time of his termination on Wednesday, May 28. The Respondent, however, paid Powers as if he had worked 50 hours for the week (or 2 more 10-hour days, through Friday, May 30).

By letter dated May 30, Kozicki demanded that the Respondent recognize the Union as the collective-bargaining representative of the mechanics.

The General Counsel also called Horton who testified that at one point during the May 9 meeting between Madias and the mechanics, Madias told them: "I do not want nobody to leave. I am not getting rid of nobody, but if you guys need a letter of recommendation, I will be more than happy to give you one."

Mullins was the Respondent's general manager from May 2001 through August 2002. Mullins testified that in May or June 2002 he met with Foster in Foster's office. At the time, according to Mullins, two drivers were giving the Respondent "trouble" about what the Respondent could and could not do while the truckdrivers' contract was still in effect. Mullins testified that Foster "made the statement . . . that at the end of this contract with the Teamsters, he would do what it took to get them out."[5]

2. The General Counsel's evidence—the 8(a)(1) allegations

Horton also testified that about a week or 2 after Powers' May 28 discharge, Madias approached him in the garage and

> He said, "I am not saying it is you. I have no idea who it is that signed the cards, but I would like it if you called down there and tell them that you do not want to vote." ...
>
> I gave him a puzzled look and I said, "What do you mean, 'vote'?"
>
> He said, "Mitch Foster called me and told me [that] the Union wanted to set up a vote . . . [and] that there was going to be a vote. So, I would appreciate it, if you would call down to the Union hall and tell them you do not want to vote."

Horton further testified that he did not reply to Madias' request and that he and Madias went on to talk about other topics. But, "after that, he had said, 'I would really appreciate it—make my job a whole lot easier, if you would call down there and cancel the vote.'" Horton testified that he again did not reply.

Horton further testified that during the next day at work he was again approached by Madias and

> He came out there and he asked me if I got a hold of the union steward yet.
>
> And I said, "No. I do not know who to get a hold of."
>
> He said, "Paul Kozicki."

[4] Powers and Horton testified that this meeting occurred on May 20; Madias, however, was credible in his testimony that it occurred before he went on vacation on May 10.

[5] The transcript, p. 159, L. 25, is corrected to change "he would what . . . " to "he would do what , . . . "

> I said, "Well, I do not even have the number. Do you have the number?"
>
> He said, "Yes. I have it, in my office."
>
> He went into his office [and then returned to the garage] and handed it to me.
>
> He said, "I would really appreciate it, if you would call down there."

Horton identified as a piece of paper that Madias had then handed to him one that is about 2 by 3 inches. On the paper is hand-printed "Paul Kozicki" and a telephone number. The number is that of the Union, as displayed on the letterhead of Kozicki's May 30 demand for recognition as well as on the June 3 petition for election. The paper appears to have been torn from a business-type memo pad because it has two Michigan business addresses preprinted at the bottom (one in Romulus and one in Bay City). Horton acknowledged that he did not know who had printed Kozicki's name and the Union's telephone number on the paper.

Horton further testified that on the following day Madias again approached him in the garage and "asked me if I got a hold of Paul." Horton replied that he had called Kozicki and left a message, but Kozicki had not called him back.

Based on this testimony by Horton, the complaint alleges that, in violation of Section 8(a)(1), the Respondent, by Madias, coercively: (a) on or about June 10, asked an employee to tell the Union to withdraw its petition in the representation case; (b) on or about June 11, interrogated an employee about whether he had done so; and (c) on or about June 13, again interrogated and employee about whether he had done so.

At trial, I granted a motion by the General Counsel to amend the complaint to add an 8(a)(1) allegation that the Respondent, by its attorney, Thomas F. Campbell, in August, 2003, at the Respondent's facility, "interrogated its employees about their union activities and sympathies." In support of this allegation, Horton further testified that, shortly before the hearing in this case, Madias asked him to go into an office to answer a few questions that the Respondent's attorney had. Horton agreed and went into the office. Horton testified that in the office, when he was alone with Campbell, with the door closed, Campbell introduced himself and told him some things about Campbell's law firm. Campbell then told him that anything that was said between them was not a secret and that Horton was free to tell anyone what had been said between them. Then, according to Horton

> He asked me a few questions; if I knew, like how much money, you know, the Company was making or spending or anything like that. And I do not know nothing of that. He asked me if I knew if we were farming out more work than what we were. I told him, yes, we were. He asked me if I knew of any management that talked to any of the employees about the Union.
>
> I told him, "I do not want to talk about that."
>
> He said, "No problem."

Campbell did not ask Horton anything else. Horton testified that the conversation with Campbell had lasted about 5 minutes. At trial, Campbell acknowledged that Horton's testimony was "a very accurate account" of an event that happened as he prepared for trial.

The General Counsel also called Messer who testified that, about a week before the hearing, at Madias' request, he also met with Campbell in an office. According to Messer

> He just asked me, did I know the financial end of the Company and I told him, I did not. [Campbell asked me], did I know anything, about why Mr. Powers was let go from the Company. I told him I did not know. He asked me, was it because of union activities, and I told him, "No, I do not believe that is . . . "—I mean, as far as my knowledge is, the Company has been with the Union since it has been opened, which is long before I was born. . . . That was it.

On cross-examination, Messer acknowledged that Campbell told him during their meeting that their meeting was not privileged and that Messer was free to relay its contents to anyone. At trial, Campbell did not acknowledge that Messer' testimony was accurate, but he did not deny it by his own testimony.

3. Evidence presented by the Respondent

Madias, the Respondent's only witness, was asked on direct examination and he testified

> Q. Now, when was the decision made that IMC had to eliminate the position held by Dave Powers?
>
> A. I had come to that decision, personally, by the end of April.
>
> Q. Okay.
>
> A. We could no longer afford three people in the garage.
>
> Q. All right. Well—do you know—speaking generally, do you know what the average monthly revenue was for IMC in the calendar year, 2002?
>
> A. A little over $200,000.00, $230,000.00, I believe.

Madias testified that the Respondent's average monthly revenue during the first 5 months of 2003 was "less than $140,000." Madias testified that, beginning shortly after Christmas 2002, Foster told him repeatedly, "that I should reduce the workforce in the garage by one. He felt we had one individual too many." Madias testified that he repeatedly told Foster to "give me a little time, to get the feel of what was happening in the garage." Madias volunteered that, by this statement to Foster, he meant that: "I wanted to have a feel for the employees, what their strengths were, what their weaknesses were, and how they fit into the organization."

Madias further testified that, at the end of January or mid-February, he recommended to Foster that all three mechanics be retained but that the Respondent cut their hours back to 50 per week. At the time, 150 man-hours per week in the garage was more than sufficient to do the work that the Respondent had because the Respondent then had only three or four truckdrivers working. When Powers complained about not getting more than 50 hours per week, he discussed with Powers the fact that Foster was wanting him to cut the mechanics' workweek from 50 to 40 hours, and to eliminate a position, probably Horton's. (In rebuttal Powers did not deny that this conversation occurred; he only testified that he could not remember it.)

Further according to Madias, business picked up in the spring, but the Respondent continued to hold the mechanics to 50 hours per week and started contracting out the remaining work to J&R Mobile Truck and Trailer Repair (J&R), a firm that did the work at the Respondent's premises. According to Madias, contracting out to J&R had the advantage of a warranty on each job, and J&R's prices were much lower than those quoted by other outside firms.[6]

Madias further testified that, although he had decided by the end of April to eliminate Powers's position, he did not discuss that decision with Foster until May 27 because: (1) he met with Foster only on Tuesdays; (2) he took a vacation from May 10 through May 20; (3) he therefore did not return to work from vacation until May 21; and (4) the first Tuesday after he returned was May 27. On that date, further according to Madias, he told Foster that he intended to terminate Powers "the next day." Madias further testified that he did not tell Foster before he left on vacation that he had decided to terminate Powers because it would have been unfair to Foster to tell him that he (Madias) was cutting the garage's labor force by one-third and then immediately leave on vacation. Madias further testified that, since Powers was terminated, Horton and Messer are qualified to do the work "that they're doing." And Madias further testified that the elimination of Powers's position, has resulted in "cost savings to the company."

The Respondent produced no documentation to support Madias' statements about the Respondent's financial position or any savings that Powers's termination may have produced. Also, the Respondent's counsel questioned Madias about the May 9 meeting with Powers, Messer, and Horton, but he did not ask Madias to deny the testimony of Powers and Horton that he told the employees that the Respondent did not plan to lay anyone off.

Madias described the end of his May 28 lunch with Kozicki as

> Paul says, Nick, I want to tell you this. I do not want you to get blindsided by it but this is what's happening. I have had a majority of your people in the garage sign cards that they want to organize. . . .
>
> I said, "Paul, after lunch, I am going back and I am eliminating one of the positions. So, how can there be a majority? There is only going to be two."
>
> [Kozicki said,] "Well, you have got three."
>
> I said, "Well, but there is only going to be two. I am going back after lunch today and I am going to eliminate one of the positions."

On cross-examination, Madias denied that Powers was any more outspoken at the May 9 meeting than Horton. Madias further denied knowing who the cardsigners were before he terminated Powers. Madias denied that he ever referred to Powers as the "lead mechanic," but he acknowledged that when scheduling work, "I would work through Dave." Madias acknowledged that Powers was the most skilled of the three mechanics, but he added that "He's also paid the highest in the shop."

Also on cross-examination, Madias was further asked and he testified

> Q. BY MR. KARMOL: And during the week that Dave Powers was, or the position was eliminated, there were still a lot of repairs, isn't that correct?
>
> A. Yes.
>
> Q. So in regards to repairs it's not a question of whether or not there was a lack of work, isn't it? There was more than enough repairs to be done, isn't that true?
>
> A. Yes.
>
> Q. And isn't it true that you released Dave Powers several hours after finding out the majority of the mechanics had signed cards on Wednesday, May 28th?
>
> A. Yes, it's a coincidence.

Madias was further asked on cross-examination, and he testified

> Q. BY MR. KARMOL: After Mr. Powers was let go, did the other two mechanics start working more hours per week?
>
> A. In relation—but this had no direct relation to Mr. Powers' elimination.
>
> JUDGE EVANS: —that's a simple yes or no question. Did they start working more hours per week than they had been previously during 2003?
>
> THE WITNESS: Only for that, since that time period. I guess the answer is yes, your honor, but I, it —
>
> JUDGE EVANS: —you'll have, your counsel will have you on redirect.

On the issue of what Madias said to Horton after the election petition was filed by the Union, Madias testified that the only telephone number that he ever used for Kozicki was Kozicki's cell phone number, which number is different from the number that was on the paper that Horton identified as that which was given to him by Madias. Madias denied writing on the paper, he denied giving it to Horton, and he denied that he asked Horton to call the Union and ask that the petition be withdrawn.

### *B. Analysis and Conclusions*

The complaint alleges that the Respondent violated Section 8(a)(3) by discharging Powers on May 28 with the object of discouraging the union activities of its employees. In order to establish a prima facie case of such alleged unlawful discrimination, the General Counsel must persuade the Board that antiunion sentiment, or animus, was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

The Board has held that where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised. *La Gloria Oil*, 337 NLRB

[6] J&R is owned by one Jeff Messer; the Respondent's employee Ron Messer is also an employee of J&R. Jeff Messer and Ron Messer are brothers, and both are nephews of Powers.

No. 177 (2002), enfd. mem. 71 Fed. Appx. 441, (5th Cir. 2003). In this case, the timing was immediate; about 12:30 p.m. on May 28, Madias learned that "a majority" of the Respondent's three mechanics had signed union authorization cards, and by 3 p.m., he had terminated Powers. Without more, therefore, I would find that the General Counsel has established that the Respondent was motivated by the known union activities of its employees when it discharged Powers. There is, however, more evidence of animus. Mullins testified that in 2002 Foster made the unqualified statement that he would do "what it took" to get rid of the Union at the end of the truckdrivers' current contract. Because the Respondent did not call Foster to testify, that testimony by Mullins was uncontradicted, and I found it credible. Mullins's testimony is further evidence that the Respondent is motivated by antiunion considerations in its dealings with its employees. As well, I found credible Horton's testimony that, shortly after the Respondent's termination of Powers, Madias repeatedly asked him to contact Kozicki and ask that the Union withdraw the petition for the Board election for the mechanics. In so doing, Madias went so far as to provide the telephone number of the Union to Horton. Madias denied this testimony, but Horton is currently employed by the Respondent, and the Respondent suggests no reason why Horton would lie while he is subject to retaliation (subtle or blatant).[7] I find that Horton was not untruthful; as well as having much to lose by false testimony, he had a positive demeanor. Moreover, Horton's testimony that in June Madias solicited him to prevail upon the Union to withdraw the petition is logically consistent with Kozicki's undisputed testimony that he had to tell Madias on May 28 that the Union could not delay the filing of the petition because he had to do what the employees (such as Horton) wanted. I therefore find and conclude that, as alleged, by Madias' solicitations and interrogations of Horton the Respondent violated Section 8(a)(1). I also conclude that this conduct by Madias is further evidence of the Respondent's animus toward its employees' union activities that would support an inference of unlawful discrimination against Powers.

The Respondent contends that, even if its unlawful animus has been demonstrated, the General Counsel failed to prove that the Respondent knew of Powers's union activities. Powers was the employee who contacted Kozicki of the Union, but, admittedly, there is no direct evidence that Madias (or Foster) knew of that activity. The issue, therefore, is whether the Respondent can be charged with knowledge of Powers's union activities, even absent direct evidence of such knowledge. I find that it can, and that it must be.

As the Board stated in *Montgomery Ward & Co*., 316 NLRB 1248 (1995):

> Initially, we agree with the judge that a prerequisite to establishing that [two named alleged discriminatees] were wrongfully discharged is finding that the Respondent knew of their union activities. *Mack's Supermarkets*, 288 NLRB 1082, 1101 (1988). This "knowledge" need not be established directly, however, but may rest on circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Greco & Haines, Inc*., 306 NLRB 634 (1992); *Dr. Frederick Davidowitz, D.D.S*., 277 NLRB 1046 (1985); *Coca-Cola Bottling Co. of Miami*, 237 NLRB 936, 944 (1978). Indeed, the Board has inferred knowledge based on such circumstantial evidence as: (1) the timing of the allegedly discriminatory action; (2) the respondent's general knowledge of union activities; (3) animus; and (4) disparate treatment. *Greco & Haines*, supra; *E. Mishan & Sons*, 242 NLRB 1344, 1345 (1979); *General Iron Corp*., 218 NLRB 770, 778 (1975). ...
>
> The factors on which the Board relies when inferring knowledge do not exist in isolation, but frequently coexist. [Footnote omitted.] For example, in *BMD Sportswear Corp*., 283 NLRB 142, 142-143 (1987), enfd. 847 F.2d 835 (2d Cir. 1988), the Board reversed the judge and found that the General Counsel had established that alleged discriminatees were unlawfully laid off, even in the absence of direct evidence that the employer knew of their union activities. There the respondent had demonstrated antiunion animus, discriminated against other employees, proffered unsubstantiated reasons for the layoffs, and the layoffs were proximate to the start of the union organizing campaign. See also *Active Transportation*, 296 NLRB 431, 432 (1989), enfd. 924 F.2d 1057 (6th Cir. 1991).

Although no other employees (in this three-employee unit) have been shown to have been unlawfully discriminated against, I find that *Montgomery Ward* applies because of the following factors: (1) the permanent layoff of Powers came, again, within hours of the Respondent's first proven knowledge of the Union's organizing campaign; (2) the Respondent's animus is independently demonstrated by Madias' coercive attempts to get Horton to get the Union to withdraw the petition and by Foster' unqualified statement to Mullins that he would do whatever it took to rid the Respondent of the Union after the truckdrivers' contract ran out; and (3) the Respondent has offered only "unsubstantiated reasons" for the layoff.

Madias testified that he decided to terminate Powers because "We could no longer afford three people in the garage." This reason was unsubstantiated because the Respondent offered as its support only Madias' bare testimony that "[o]ur average [revenue] for the first five months of the year was less than $140,000.00" and that "speaking generally," the Respondent's average monthly revenue for the entire year of 2002 was, "[a] little over $200,000.00, $230,000.00, I believe." The Respondent offered no testimony or documentary evidence about what the Respondent's revenues for the first 5 months of 2002 were. This is critical because the Respondent's business picks up substantially as the weather gets warmer, and, even accepting Madias' "speaking generally" testimony, there is no cogent way to compare the Respondent's economic situation during the first months of 2003 with those of 2002. Moreover, and again accepting Madias' oral representations about the Respondent's revenues during the first 5 months of 2003, Madias testified

[7] In *Flexsteel Industries*, 316 NLRB 745 (1995), the Board stated that, although there is no presumption of credibly to be afforded to their testimony, "the testimony of current employees which contradicts statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests."

that he decided to terminate Powers "by the end of April." Therefore, even accepting Madias' testimony, the month after the alleged decision could have been particularly bad for receipts, which would have skewed any fair comparison of the figures. (At another point, Madias testified that the Respondent's customers were chronically slow in paying; such slowness could have made May a particularly bad month for revenues.) Therefore, even if Madias' vague ("speaking generally," and "I believe") testimony is accepted, is not a substantiation of the reasons advanced for the Respondent's actions.

Moreover, Madias' unsupported testimony of the Respondent's financial condition cannot be accepted on any account. Madias' testimony was offered as a representation of the Respondent's financial records. Madias, however, is not the Respondent's comptroller; it was stipulated that one Greg Van Dorn is the Respondent's comptroller. The Respondent offered neither the records themselves nor the testimony of Van Dorn to substantiate its professed financial distress during the first 5 (or 4) months of 2003. I draw an adverse inferences against the Respondent both for its failure to present the records that purportedly would have substantiated its professed reasons for the termination of Powers[8] and for its failure, at least, to present Van Dorn.[9] As well, I draw an adverse inference against the Respondent for its failure to present Foster who, according to Madias, told him as early as January to lay off one of the three mechanics. If there had been any truth to that testimony, the Respondent assuredly would have called Foster to so testify.[10]

Additionally, Madias acknowledged that the Respondent continued subcontracting work and continued working the remaining mechanics, Horton and Messer, more overtime after the termination of Powers. If, as Madias suggested (but did not directly testify), there was no increase in the amount of subcontracting to compensate for the absence of Powers, the Respondent presumably had the records to prove it. And if, as Madias further suggested (but also did not directly testify) the additional hours of Horton and Messer would not have justified a third employee in the garage, the Respondent presumably would have had the records to prove that also.[11] And if, as Madias also suggested (but also did not testify), the Respondent could do the garage's work cheaper by subcontracting and having Messer and Horton work more overtime, the Respondent presumably would have had the records to prove it. But the Respondent did not produce any such records, and its failure to do so fortifies my conclusion that the Respondent's theory of economic justification for the layoff of any employee was simply unsubstantiated.

Therefore, in view of (a) the Respondent's demonstrated animus; (b) the immediate temporal proximity of the Respondent's general knowledge of the organizational attempt and its termination of Powers; and (c) the unsubstantiated nature of the Respondent's proffered reasons for the termination of Powers, I find and conclude that Madias did know that it was Powers who had initially contacted the Union and started the organizational attempt among its mechanics. *Montgomery Ward & Co.*, supra, and cases cited therein.[12]

Because the elements of knowledge and animus have been established, I conclude that the General Counsel has established a prima facie case that Powers was discharged in violation of Section 8(a)(3), and the burden under *Wright Line* was upon the Respondent to demonstrate by a preponderance of the evidence that it would have discharged him even absent his union activities.[13]

Of course, the greater includes the lesser—the Respondent has failed to demonstrate that it would have terminated the employment of any mechanic when it discharged (or permanently laid off, or otherwise terminated) Powers; therefore, the Respondent has failed to demonstrate that it would have laid off Powers. Accordingly, a finding of a violation under *Wright Line*, without further analysis, is compelled.[14] But, assuming arguendo that the Respondent has demonstrated that it would have terminated some mechanic on May 28, it has not demonstrated that it would have selected Powers.

That an employer would select for layoff its employee who is its least skilled is a proposition that bears obvious logic. Conversely, the proposition that an employer would select for layoff its employee who is the most skilled bears obvious illogic. When asked if Powers were not the most skilled of the Respondent's mechanics, Madias agreed, but added that Powers was "paid the highest in the shop." Madias, however, never testified that he selected Powers because he was the highest paid; in fact, Madias never testified to any reason that he selected Powers, over Messer and Horton, for layoff. But even if the Board accepts Madias' reference to wage differences as the Respondent's statement of a defense, that defense self-destructs with its palpable illogic.

At the time of his termination, Powers was paid $16 per hour; Messer and Horton were paid $15 and $14.75 per hour, respectively. Based on the 50-hour week that the employees

[8] See *Electrical Construction & Maintenance*, 307 NLRB 1247 (1992) (violative layoff found where the Employer claimed diminished revenues but offered no documentary evidence "to support its bare claims at the hearing.").

[9] See *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2 (1987), enfd. 863 F.2d 964 (D.C. Cir. 1988), where the Board explained that:

> An adverse inference is properly drawn regarding any matter about which a witness is likely to have knowledge if a party fails to call that witness to support its position and the witness may reasonably be assumed to be favorably disposed to the party.

[10] Id.

[11] Madias testified that the three mechanics began working 50 hours per week during the cold months of January and February. Logically, as the work increased with the warmth of spring, more man-hours would have been required.

[12] It is also to be noted that Madias admitted that, when Kozicki told him that the Union had received authorization cards from a majority of the Respondent's three mechanics, he asked how that could be because he intended to discharge one of them. Evidently Madias knew that the employee whom he then determined to discharge had signed one of them.

[13] *Wright Line*, supra, and *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001).

[14] My conclusion that the Respondent did not demonstrate any legitimate need for laying off any employees is fortified by the undisputed testimony of Powers and Horton that on May 9 Madias told the mechanics that the Respondent was not planning a layoff and that the Respondent did not want any of the mechanics to leave.

were working, the Respondent saved itself $50 per week by choosing Powers rather than Messer for layoff, or it saved itself $62.50 per week by choosing Powers rather than Horton. It is unlikely to the point of disbelief that the success of Respondent's business depended on these marginal savings, which savings would necessarily be reduced by expenses incurred by the loss of the Respondent's lead, and most experienced, mechanic.[15] Therefore, the Respondent's professed reason for selecting Powers for layoff is a mere sham that must be rejected under *Wright Line*.

An obvious part of the Respondent's sham defense is Madias' testimony that he told Foster on May 27 that he intended to terminate Powers "the next day," Wednesday, May 28. This self-serving, unsupported testimony raises the immediate question of why Madias did not tell Foster that he was terminating Powers that very day if it was so important economically that the Respondent be rid of Powers before the end of the pay period on Friday. After all, the Respondent was paying Powers as if he worked until Friday, and its failure to work him until Friday bespeaks of motive of revenge or preemption, not economics or any other legitimate consideration.

Moreover, evidence that the Respondent has offered only a sham defense to the General Counsel's prima facie case is found in Madias' own hand. On March 7, Madias wrote that Powers was the Respondent's "Shop Foreman" who had a "Probability of Continued Employment" that was "Very High/Excellent." Yet, Madias testified that he decided to terminate Powers "by the end of April." The Respondent, however, offered no evidence of how, or why, Madias' opinion of Powers degenerated in the short period of 2 months. (Tellingly, the Respondent on brief does not even mention Madias' March 7 statement to the loan company.)

Finally, as well as his writing, Madias' testimony reveals that neither wage-savings nor any other legitimate consideration was the reason for discharging Powers. Madias testified that Foster told him as early as January to discharge one mechanic. Madias did not testify that he needed from January until May to find out which mechanic was making the greatest wage rate. Rather, Madias testified that he delayed until May because he wanted to get "a feel for the employees, what their strengths were, what their weaknesses were, and how they fit into the organization." Yet the Respondent would have the Board believe that, without unlawful motive, he chose for layoff the employee who had exhibited the greatest "strengths," and who was the employee who "fit into the organization" as lead employee (or "Foreman" as Madias described Powers to the loan company). This is too much to believe, and I do not.

Therefore, I necessarily conclude that the Respondent has failed to demonstrate by a preponderance of the evidence that it would have discharged Powers even absent his known (or suspected) support for the Union. Accordingly, I find and conclude that the Respondent discharged Powers in violation of Section 8(a)(3).

As well, I find and conclude that the Respondent, by Campbell, unlawfully interrogated Messer and Horton by failing to advise them that the purpose of his questioning was preparation for an unfair labor practice hearing before the Board, by failing to assure them that their cooperation with his pretrial investigation was voluntary, and by failing to assure them that no reprisals would be taken against them if they declined to answer his questions.[16]

[15] The Respondent did not suggest any other way that it was trying to cut costs at the time that it discharged Powers.

### THE REMEDY

Having found that the Respondent unlawfully discharged Powers and committed other unlawful actions, I shall order it to take certain additional affirmative actions designed to remedy the violations and effectuate the policies of the Act. Specifically, I shall order the Respondent to offer Powers full reinstatement to his former job and to make him whole for any loss of earnings or other benefits that he has suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). The Respondent shall also be required to remove from its files any and all references to Powers' unlawful discharge and to notify Powers in writing that this has been done.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

### ORDER

The National Labor Relations Board orders that the Respondent, Industrial Materials Clearance, Inc., of Romulus, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Asking any employee to tell the Union to withdraw a petition for election that it has filed with the Board.

(b) Interrogating any employee about whether he or she has complied with its request that the employee tell the Union to withdraw a petition for election that it has filed with the Board.

(c) Interrogating employees about events that are the subject of unfair labor practice proceedings without advising such employees truthfully that the purpose of any such interrogation is preparation for an unfair labor practice hearing before the Board, or without giving such employees assurances that their participation in any such interrogation is voluntary, or without giving such employees assurances that no reprisals will be taken against them if they decline to answer its questions.

(c) Discharging or otherwise discriminating against its employees because of their protected activities on behalf of the Union.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

[16] See *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), enf. denied on other grounds 344 F.2d 617 (8th Cir. 1965), and *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987).

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative actions that are necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer to David Powers full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges that he previously enjoyed.

(b) Make David Powers whole for any loss of earnings or other employment benefits that he suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any references to David Powers' unlawful discharge, and within 3 days thereafter notify him in writing that this has been done and that evidence of the discharge will not be used against him in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facility in Romulus, Michigan, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 28, 2003, the date of the first unfair labor practice found herein.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent had taken to comply.

The Representation Case

Because I have found that Powers was discharged in violation of Section 8(a)(3) and (1) of the Act, I overrule the challenge to his ballot in the representation case. Case 7–RC–22490 is therefore severed and remanded to the Regional Director to open and count Powers' ballot and to prepare and serve on the parties a revised tally of ballots and issue the appropriate certification.

Dated, Washington, D.C. November 5, 2003

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT discharge you, or otherwise discriminate against you, because of your membership in, or activities on behalf of, Local 247, International Brotherhood of Teamsters, AFL–CIO (the Union).

WE WILL NOT ask you to tell the Union to withdraw a petition for election that it has filed with the Board.

WE WILL NOT interrogate you about whether you have complied with any request that you tell the Union to withdraw a petition for election that it has filed with the Board.

WE WILL NOT question you about events that are the subject of unfair labor practice proceedings without advising you truthfully that the purpose of our questioning is preparation for an unfair labor practice hearing before the Board, without giving you assurances that your participation in any such interrogation is voluntary, or without giving you assurances that no reprisals will be taken against you if you decline to answer our questions.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL, within 14 days of the Board's Order, offer David Powers immediate reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from our discrimination against him, less any net interim earnings, plus interest.

WE WILL, within 14 days of the Board's Order, remove from our files any reference to the May 28, 2003, discharge of David Powers, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

INDUSTRIAL MATERIALS CLEARANCE, INC.

[18] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.